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Supreme Court of the United States

OCTOBER TERM, 1956

No. 425

ANGUS M. MacNEIL,
PETITIONER,

v.

UNITED STATES OF AMERICA,
RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

ANGUS M. MacNEIL
Petitioner
547 Somerville Avenue
Somerville, Massachusetts

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

The petitioner Angus M. MacNeil prays that a writ of certiorari issue to review the judgment of the Court of Appeals for the First Circuit entered on August 10, 1956 to the extent that said judgment affirmed the finding that MacNeil is in violation of Title 18 U.S.C. 401(2)(3), and the further action of said Court in denying of a petition for rehearing on August 15, 1956.

Citation to Opinion Below

The opinion below has not as yet been published in the law publications as yet but will be included in 133 F.2nd . . . when published. A copy of the opinion is annexed hereto

and known as exhibit Appendix A. The opinion of the District Court is also included in R.A. 10.

Jurisdiction

Jurisdiction in this case is conferred by U.S.C. Title 28 Section 1254.(1). The judgment of the Court of Appeals was entered on August 10, 1956. The petitioner filed a Petition for Rehearing on August 13, 1956. This Petition was denied on August 15, 1956.

Questions Presented

1.) Whether the Court could find and adjudicate as guilty of contempt of Court under Title 18 section 401(2) a person whose only office of court held was that of Attorney at Law of other courts but not of the trial court and who was not at the time practicing in said court.

2.) Whether the order of Court made on January 2, 1956 vacating the finding of December 30, 1955 of guilty and the new finding of guilty made on January 4, 1956 constituted a subjection of the defendant to double jeopardy in violation of the laws of the United States.

3.) Whether the "Memorandum of Instructions" *ante* is a sufficient statement of essential facts upon which to base a charge of criminal contempt, in accordance with Rule 42 of the Federal Rules of Criminal Procedure.

4.) Whether the Court of Appeals could properly consider matter contained in the Appellees Record Appendix which was not certified to the District Court nor filed with him nor certified to the Court of Appeals nor filed with it.

5.) Whether a valid conviction could be had on a proceedings in which; 1) There was a motion to strike the "Memorandum of Instructions" so called, which had not

been acted upon by the Court; 2) There was filed a demand for statement of fact under Rule 42 which had not been acted upon by the Court; 3) Where the request of the defendant for assistance of counsel was summarily denied; 4) There was docketed a hearing on the return date in the absence of the defendant; 5) There was no plea requested or received by the court; 6) Where a finding of guilty of "civil and criminal contempt" made on December 30, 1955 and vacated by the court of its own motion followed by a new finding of guilty of contempt by violation of Title 18, U.S.C. sec. 401(2) and (3), and finding the petitioner in civil contempt, without previous notice of any such charges being made against him personally; 7) Where no evidence was offered or charge made to prove any control of the occurrences claimed to have been committed, in the petitioner personally; 8) There was no evidence offered of any valid order made against the defendant personally, by the Court; 9) No valid order was made at any time to which there was a failure of compliance.

Constitutional Provisions, Statutes and Rules

1.) Amendment to the United States Constitution, numbered 6 provides "In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and District wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, to have the Assistance of Counsel for his defense."

2.) Amendment 5 of said Constitution reads; "No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of

a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

3.) Rule 42(b) Rules of Criminal Procedure, 18 U.S.C. provides: Disposition upon notice and hearing. A criminal contempt except as provided in subdivision (a) of this rule shall be prosecuted on notice. The notice shall state the time and place of hearing, allowing a reasonable time for the preparation of the defence, and shall state the essential facts constituting the criminal contempt charged and describe it as such. The notice shall be given orally by the judge in open court in the presence of the defendant or on application of the United States Attorney or of an attorney appointed by the Court for that purpose, by an order to show cause or an order of arrest. The defendant is entitled to a trial by jury in any case in which an act of Congress so provides. He is entitled to admission to bail as provided by these rules. If the contempt charge involves disrespect to or criticism of a judge, that judge is disqualified from presiding at the trial or hearing except with the defendants consent. Upon a verdict or finding of guilt the court shall enter an order fixing the punishment.

Rule 44 of Rules of Criminal Procedure

Assignment of Counsel: If the defendant appears in court without counsel, the Court shall advise him of his right to counsel and assign counsel to represent him at every stage of the proceeding unless he elects to proceed without counsel or is able to obtain counsel.

Rule 58 of Rules of Civil Procedure

". . . The notation of judgment in the civil docket as

provided by Rule 79(a) constitutes the entry of the judgment; and the judgment is not effective before such entry. . . ."

Rule 54 of Rules of Civil Procedure

"Definition; form; "Judgment" as used in these rules includes a decree and any order from which an appeal lies. . . ."

Statement of the Case

On December 7, 1955 the Marshal of the District of Massachusetts served upon defendant, an attorney at law, at Boston, Mass. a memorandum of Instructions so called Appellants R.A. 1a. Said memorandum of instructions read as follows:

> *Memorandum of Instructions to show cause why Angus M. MacNeil should not be found in civil and criminal contempt.*

In the United States District Court for the District of New Hampshire in civil action 1035 entitled *United States of America* v. *Garden Homes Inc.*, by an order on motion of defendant for instructions under date of September 17, 1953, Honorable Aloysius J. Connor, United States District Judge, ordered ". . . that payment for maintenance, care, and operation of the property of the Corporation are to be paid by the receiver, upon presentation to him of payroll accounts and outstanding bills . . .".

At a further hearing in the same action on June 27, 1955 the receiver stated that funds sufficient to pay three certain accounts had been paid by him to Garden Homes Inc. against its voucher, but had not been paid by Garden Homes Inc. to the creditors. The amounts and accounts were enumerated by the receiver as follows: Joseph Pepin, $44.64;

Sal Toscano, $59.12; J. J. Moreau & Sons, Inc., $309.33; total $473.09.

Whereupon Judge Connor, in open court ordered Angus M. MacNeil, President of Garden Homes Inc., then present, as follows: "I am going to give you twenty days to produce that money or issue a citation for you to show cause why you shouldn't be cited for contempt."

At a further hearing in the same action on November 15, 1955 Judge Connor determined, by inquiry addressed to Angus M. MacNeil, that the order of June 27, 1955 had not been complied with. Whereupon Judge Connor, in open Court notified Angus M. MacNeil to appear at the Courthouse in Concord, New Hampshire on December 12, 1955 at 11:00 o'clock in the forenoon to show cause why he should not be held in civil and criminal contempt. At the same time, in addition to giving Angus M. MacNeil notice of the time and place of the hearing, Judge Connor orally stated the essential facts constituting the contempt charged which were in substance enumerated above.

Submitted by,

Maurice P. Bois,

United States Attorney

A true copy, certified this twenty-eighth day of November, 1955.

Elizabeth M. Hoyt
Chief Deputy Clerk
United States District Court

A true copy attest.

Michael H. Barry, Dep. U.S. Marshal.

There was no caption or seal of court or approval of court thereon.

On December 9, 1955 he filed prose a motion to strike said memorandum of instructions said motion is set forth on R.A. 8. On December 14 he filed a demand under Rule 42 as set forth on R.A. 9. The defendant challenges com-

pliance with rule 42 of the Rules of Criminal Procedure for Criminal Contempt.

The Record on Appeal is put in issue by the fact that appellee has caused a Record Appendix to its brief to contain much matter not contained in any record filed with the clerk of the District Court and transmitted by him to the clerk of the Court of Appeals, nor certified by him as being the record in the case. On motion made to the Court of Appeals to strike the matters not properly included, the said court took no action. The principal contents thereof objected to are contained in pages 50(8) to 140(98). No such original transcript has been certified to be filed with either the clerk of the District Court nor the clerk of the Court of Appeals.

No where in the record as certified and filed from the District Court does it appear that any notice in compliance with Rule 42 of Rules of Criminal Procedure was given to the defendant, nor was he ever apprized of the charges being made against him. The memorandum of instructions purports merely to reduce to written form the substance of a notice claimed to have been given in open court. It is merely a recitation of alleged facts and does not in affirmative terms allege that the petitioner did do anything proscribed nor refuse to do anything ordered.

It will be noted that the said "memorandum of instructions" is completely informal and not under the seal or signature of court and was not captioned in any case in court. It appears to be solely a memorandum, not a notice in compliance with rule 42. Other than as contained in said pages of the Appellees record appendix there appears no evidence of substantial nature of action taken at any hearing nor orders of June 27, 1955 nor of September 17, 1953 nor of November 15, 1955 nor of the statements alleged to have been made by Judge Connor on November 15, 1955. There appears nowhere in the record any proof

of any notice given by the Court of any charges except as stated in the said pages not filed nor certified.

As the petitioner made timely motion for striking said portions of the record before the Court of Appeals it is contended that the court should not have permitted them to remain therein even if it did not strike the entire Record Appendix of the Appellee for failure of compliance with rule of court. See certificate of clerk of District Court, motion to strike, excerpt p. 12. All proceedings were docketed in case No. 1035, *U. S.* v. *Garden Homes Inc.* (R.A. 45). For Court of Appeal rule excerpt see p. 31, *infra.*

The petitioner was never notified of any order that was violated in which the court could charge him with liability for performance. The petitioner questions the form and contents of the notification so called under Rule 42 of Rules of Civil Procedure. He denies that any order was issued to which he violated, and further states that he violated no order to which he was chargeable with compliance. No arraignment was had and no plea taken. He requested assignment of counsel and was summarily denied, without investigation of ability to obtain counsel in other ways. He claims he was subjected to double jeopardy by virtue of the vacation of a finding of guilty of civil and criminal contempt on December 30, 1955 and a new finding of guilty of civil contempt and guilty of criminal contempt for violation of Title 18, sec. 401 U.S.C. par. (2) and (3).

The finding of civil contempt was vacated by the Court of Appeals.

Reasons for Granting Writ

I.

The defendant is an attorney at law of jurisdictions other than that of the District Court for the United States for the District of New Hampshire. He is of course an attorney

at law and recognized as such in Massachusetts. But in view of the recent case decided by this court, *Cammer* v. *U. S.*, 350 U.S. 399, "We hold that a lawyer is not the kind of officer who can be summarily tried for contempt under 18 U.S.C. 401(2)." It appears from said decision that the finding of guilty made against the defendant of criminal contempt as an officer of court is error in the light of said decision.

II.

The District Court served notice upon the defendant that he was obliged to appear and show cause why he should not be held "in civil and criminal contempt". There is not a word to advise him that he was to stand trial on charges of "Misbehavior of any officer of court in his official transactions". The court found on December 30, 1955 the defendant guilty of criminal contempt, not violation of Title 18, sec. 401(2) or of sec. 401(3). Not a word was stated that he was obliged to defend against charges of action in any official transaction. The Court in December found him guilty of an offense that may well not have been criminal at all or punishable as a crime if guilty. There was not a fact found identifying the crime except the general phrase Contempt. It is well known there may be contempts not punishable. The vacating of the finding in December and the new finding in January 1956 was a case of double jeopardy and a violation of the defendant's constitutional rights. See R.A. 40-41. As follows "Now taking the matter at hand, let the record show that the verdicts of guilty in civil and criminal contempt of last week December 30, are vacated and I am now making a guilty finding in the criminal contempt and I am finding you in civil contempt which is reflected by my findings this

day which have been reduced to an opinion and which I will hand you a copy. . . ."

On December 30, 1955 the finding of guilty of criminal contempt was for an offense not designated. The memorandum of instructions so called did not set forth the essential facts constituting the offense claimed. No where could there be a determination of what was specifically charged from the pleadings or court records. The defendant had no such knowledge after the trial nor before until the finding of January 1956. See *Wade* v. *Hunter*, 336 U.S. 689.

Sufficiency of Notice

The Rules of Criminal Procedure state concerning notice of criminal contempt Rule 42. A criminal contempt except as provided in subsection (a) of this rule shall be prosecuted on notice. The notice shall state the time and place of hearing, allowing a reasonable time for preparation of the defense, and shall state the essential facts constituting the criminal contempt charged and describe it as such. The notice shall be given orally by the judge in open court in the presence of the defendant or on application of the United States attorney or of an attorney appointed by the court for that purpose, by an order to show cause or an order for arrest.

If the notice relied upon by the Government is the memorandum of instructions referred to herein, p. 5. There appears not a single statement of an essential fact constituting an alleged criminal contempt by the petitioner. The said document does not accuse the petitioner of a thing either right or wrong. The first sentence states the history of a motion for instructions and orders given a receiver. The second, a statement of a representation of the receiver as to unpaid amounts and followed by a list of them. The third is a statement of an order of the

Judge. The next is a statement of conclusion of the judge. The fourth is a review of a statement of the judge. The next and final is another recitation of the statement of the judge. Not a single allegation of any fact constituting a criminal contempt by the petitioner. Moreover it does not appear to be an order of court having no caption as such and no allegation of any authority of the U.S. attorney to set a hearing compelling petitioner to show cause for anything. As there isn't a charge made against the petitioner of a single fact there of course could be neither an assent or a denial.

Now taking the statement made by the Court of Appeals as having been the notice given in open court. There is no record of sach in any record appendix filed in accordance with the rules of the Court of Appeals. The clerk of the District Court has never certified that such statement is part of the record of the Court nor has the stenographer who was officially appointed so certified.

III.

Indictment which fails to distinctly and specifically describe the offense with which the accused is charged and fails to advise him clearly of what he has to meet and give him an opportunity to prepare his defense is defective as violating Amendment 6 of the United States Constitution. "In criminal proceedings papers must have the same specificity as an indictment or information." *Bowles* v. *Bullock*, 5 FRD 147.

1.) The holding of the Court of Appeals for the First Circuit that the petitioner was guilty of criminal contempt by violation of Title 18, sec. 401(2) and (3) appears to violate several well established laws as determined not only by the Courts of Appeal of other Circuits but many determinations of the Supreme Court itself. It appears that

there have been violations of the Rules of the Courts so substantial as to require that the conviction be set aside. The Court of Appeals based its determination of the claim that a proper notice under Rule 42 of the Federal Rules of Criminal Procedure upon the oral notice claimed to have been given in open Court, rather than on the so called Memorandum of instructions, shown in the record. However, that no such notice appears in the certified record of the Court of Appeals. The Court of Appeals on page 4 of its opinion sets forth that, "The defendant was apprized by the trial judge in open court as follows:" R.A. 218. However, the quotation following said words was taken from the R.A. 116 (74). The said contents of the R.A. from Pages 50 (8) to the upper section of Page 140 (98) are not proper contents of the Appellee's Record Appendix never having been certified by a stenographer and filed with the clerk of the Court of Appeals. The Rules of the Court of Appeals for the First Circuit as shown in part on P. 31 herein do not make provision for uncertified and unfiled matter to be included in the R.A. of either party. However the Appellant moved the Court for striking of said portions from the R.A. of Appellee but no action was taken by the Court of said motion. *See copy of Supplemental Brief P. 3 containing motion to strike which was as follows: "Wherefore your Appellant moves that so much of the Appellants Brief as the Court finds not to be in conformity with the substantial requirements of the rules of this court be stricken from the case."* The allegation contained in said motion are in part as follows: "2) The Record of the case printed as his record appendix seems to be different than the record filed at the clerk's office. In many of its pages are there matters not included in any filed record here. Neither the Appellant nor the Court can check the accuracy of the

claim that the contents of the Appellees Record Appendix are in conformity with the facts of the case itself."

Certified copy of Certificate of Transmission by clerk of District Court is shown on P. .

1.) Motion to Strike Memorandum of Instructions, R.A. 7. Lack of Action by Court appears R.A. 1a et seq. 2.) Demand under Rule 42 on R.A. 9 and Docket R.A. 1 et seq. 3.) Motion for Assignment of counsel R.A. 9 Denial of Motion R.A. 40.

Denial of Assistance of Counsel

On January 4, 1956 the defendant having appeared without counsel requested the court for assignment of counsel. The reason is obvious from the statement of the Court on Appellees R.A. 212 or 170 as originally filed. In response to the request the answer given "you can protect yourself in any way you see fit "after denying the said request" clearly indicates the need for competent counsel. The denial vitiated the finding, and sentence. As stated in *Glasser* v. *U. S.*, 315 U.S. 60, 70. "The fact Glasser is an attorney is of course immaterial to a consideration of his right to the protection of the sixth amendment." Instead of waiving counsel in the present case, counsel was specially requested. The denial is error vitiating the judgment.

The accused rights of effective assistance is too fundamental to permit a court to indulge in nice calculations as to the amount of prejudice arising from its denial." *Butzman* v. *U. S.*, 205 U.S. 343; *Glasser* v. *U. S.*, 315 U.S. 60; *U. S.* v. *Hayman*, 342 U.S. 205. *Van Moltke* v. *Gillies*, 332 U.S. 708, 721. *Tompkins* v. *Missouri*, 323 U.S. 485. Motion in the present case was made for assistance counsel. The reply by the court was summary refusal followed soon after by ". . . you can proceed according to the Rules of Federal Criminal Procedure and protect yourself in any

way that you see fit. That is my last word on the subject." R.A. 41.

4.) Hearing in absence of defendant R.A. 1a. entry in Docket dated December 12, 1955. The holding of hearings in the absence of the defendant without his waiver seems to vitiate the finding.

The Constitution Amendment 6 requires the presence of the defendant before the court during the trial and hearings. The docket shows that the defendant was not present on December 12, 1955 in the forenoon and that hearings were held at the time. The docket clearly shows that hearing was held and the defendant missing. The extent of the hearings is a matter to be determined from outside sources. The law makes such finding void in the absence of defendant.

Accused though charged with a misdemeanor cannot be tried in his absence, "and it appears well settled that where the personal presence is necessary in point of law the record must show the fact." *Lewis* v. *U. S.*, 146 U.S. 370, 372. A leading principle that pervades the entire law of criminal procedure is that after indictment found nothing shall be done in the absence of prisoner. *Crowe* v. *U. S.*, 200 F.2nd 526.

It appears from the record that the defendant was never arraigned. Nor was any plea taken. The uncertainty of the notice as to the essentials of the offense charged would have been cleared if there had been arraignment. Rule 43 of the rules of Criminal procedure require the presence of the defendant at arraignment. The failure to hold an arraignment very seriously affected the rights of the defendant. For on December 9, 1955 he had questioned the sufficiency of the notice served upon him advising him of the charges made. By failing to hold the arraignment the defendant was deprived of his rights to obtain sufficient information of the charges being made against him. See

Appellants R.A. p. 8. "Before a court of last resort affirms a conviction of crime it must appear from the record that accused vas called upon to plead and did plead to the indictment" *Crain* v. *U. S.*, 162 U.S. 625. The right of the defendant to assert rights through pleadings and testimony may not be infringed" *Edwards* v. *U. S.*, 312 U.S. 473.

Until defendant has pleaded there is no issue to be determined and omission to plead is fatal to judgment in cases of misdemeanors as well as infamous crimes. *Shelp* v. *U. S.*, 81 F. 694. A defendant cannot be charged with one crime and convicted of another merely because the latter is developed out of proof which fails to establish the crime charged in the indictment, *Hendry* v. *U. S.*, 233 F. 5.

6.) For record of vacation of judgment and the making of new finding of guilty see R.A. 39. 7.) See R.A. and Memorandum of Instructions ante. 8.) See No. 2 ante. 9.) Intent is also missing from the claim of contempt. As is seen by *Wilson* v. *North Carolina* intent is an essential ingredient of criminal contempt. None is alleged nor proved here. See page 33.

It is clear from the record that the present proceeding was brought in the civil case of *United States* v. *Garden Homes Inc.* for foreclosure of a mortgage. See docket entries. No separate criminal proceeding has been instituted against the defendant petitioner. It appears that contrary to the of quoted doctrine to the effect that findings of fact made without evidence or proof and in a hearing at which the party is excluded are arbitrary, baseless and capricious. See *Baltimore and Ohio R.R.* v. *U. S.*, 264 U.S. 258, 264, 265. *Morgan* v. *U. S.*, 298 U.S. 468, 480. *U. S.* v. *Abilene & Southern R.R.*, 265 U.S. 275, 288, 290. *Interstate Commerce Commission* v. *Louisville & Nashville R.R.*, 227 U.S. 88, 91. However, the order entered by the court to which a charge of violation of the criminal contempt section of the U.S.C. are made, was made under the following conditions easily

recognizable from the conversation with the court as follows: "Mr. MacNeil: Your Honor, may I participate in these hearings? The Court: You may not until you comply with the rule I have laid down. You associate yourself with local counsel, and you will be allowed to participate. . . . The Court: Of course I won't note any exception, you are not here in any legal capacity, don't interrupt here again or I will have you ejected from this building." R.A. 4. No entry of the order claimed to have been violated entered on June 27, 1955. See "Memorandum of Instructions" page 5 at the time of said statement of court was ever docketed by the clerk. See docket R.A. 1. The petitioner was appearing in his personal behalf at the time not for client principally in pressing for allowance of claim against a receiver which was being heard at said time. This was not docketed as such but action was reserved on said petition and denied on August 26, 1955 and denial vacated on November 15, 1955 and dismissed without prejudice on January 27, 1956. See docket R.A. 1, 1a, and 2, and rule 54 which defines a judgment as including any decree from which an appeal lies. The petitioner was not a party to case 1035 until the contempt issue was made in November or December 1955.

Is the Memorandum of Instructions so called sufficient to comply with the requirements of the laws. The Court did not enter any order whatever that appears to have been violated. There are two orders so called to be considered. That of September 17, 1953, and that of June 27, 1955. As to the second order no claim was made in the memorandum of instructions to the effect that the defendant was accused of failing to cause Garden Homes Inc. to do anything. The District Court found on page 12 of the Appellants RA that the defendant "may be held therefore although the obligation is not a personal one." The Court of Appeals found "that the defendant was not personally liable for the pay-

ments ordered, this was apparently done out of an abundance of caution since the verdict of December 30, 1955 did not in any way imply a personal obligation." If the defendant was only directed in the order of June 27, 1955 "to produce the money" which order never became effective because it was never docketed, and as the both courts found no personal liability upon him to produce the money it seems that no case is made out. If the orders of June 27, 1955 were intended to mean that he was to cause Garden Homes Inc. to do something it would seem fair to have said so. Garden Homes Inc. is not in the contempt complaint at all and the powers of the defendant to cause Garden Homes Inc. to do anything are extremely limited. No claim was made that the defendant failed to cause Garden Homes Inc. to do anything prior to the finding. In fact the Court did not find Garden Homes Inc. guilty of anything nor charge it with any offense but merely found the defendant individually guilty of contempt. See Appellees R.A. p. 220.

As to the orders of September 17, 1953 there appear no directions or orders to the defendant whatever that were allegedly violated. The orders were solely to the Receiver to pay under certain conditions. No request was made nor was any payment made under other conditions. There could be no violation of this order by the defendant as he was not directed to do anything. As was stated in *National Labor Relations Board* v. *Standard Trouser Co.*, 162 F.2nd 1012. "Contempt of Court is a very grave thing and we are not disposed to engage in strained construction to spell out some theoretical and abstract violation of the Courts order." As was stated in *Federal Trade Commission* v. *Fairyfoot Products Co.*, 94 F.2nd 844; "It is elementary that a court is without power to adjudge one to be in contempt for violation of a court order or decree unless the alleged contemnor has violated a judicial decree or order, which by its coercive force acting directly

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rson, lawfully restrains the alleged contemnor
he acts complained of." There is not any order
rule decree or command which the defendant
n accused of violating. The order of September
one running solely to the receiver and the one
1955 was not a responsibility of the defendant
Moreover what violation was there of the order
an order. The receiver was the one ordered
l by the order of September 1953, only. There
bedience to said order. That of June 1955 was
r or determination in itself and not held to be
er of the lower courts.

the charge suggests that there was a violation,
the slightest suggestion that the question of
nt's ability to compel Garden Homes Inc. to
tain acts is in issue? There is not a word to
in the memorandum of instructions.

r of June 27, 1955 was not in law a valid order
locketing and so considered until November 1955.

CONCLUSION

For the foreg oing reasons, this petition fora writ of certiorari sho uld be grantd.

Respectfully submitted
Angus M. MacNeil Petitioner

September 13 1956

Appendix A

United States Court of Appeals
For the First Circuit

No. 5094.

ANGUS M. MacNEIL,

APPELLANT,

v.

UNITED STATES OF AMERICA,

APPELLEE.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW HAMPSHIRE

Before MAGRUDER, *Chief Judge*, and WOODBURY and HARTIGAN, *Circuit Judges*.

Angus M. MacNeil pro se.

Maurice P. Bois, United States Attorney, with whom *William Maynard*, Assistant U. S. Attorney, was on brief, for appellee.

OPINION OF THE COURT

August 10, 1956.

HARTIGAN, *Circuit Judge*. This is an appeal from a judgment entered January 4, 1956, in the United States District Court for the District of New Hampshire whereby the defendant was adjudged in civil contempt and ordered committed to custody until such time as he should comply with the Court's order to return to William H. Craig, Jr., Receiver, the sum of $473.09. The defendant was further adjudged guilty of criminal contempt and ordered to pay to the clerk of the court a fine of $400, together with costs in the amount of $137.59, and to stand committed until the sentence be performed.

The following quotation from the opinion of the trial judge provides a convenient statement of most of the relevant facts.

> "This action was brought to foreclose a mortgage upon a multiunit housing project situated in Manchester. Garden Homes, Inc., the mortgagor, remained in possession of the premises pending adjudication of the issues, and a receiver for rents and profits was appointed, with authority to reimburse the mortgagor for the necessary expenses incurred in the maintenance and operation of the project. This procedure proved unsatisfactory to Garden Homes, and, claiming it was a hardship to require it to pay these expenses in the first instance, it petitioned this court to instruct the receiver to make payments to it for maintenance upon presentation of proper vouchers retailing the debts incurred. On September 17, 1953, the following order was entered: 'Upon consideration of defendant's motion for instructions, filed August 10, 1953, the receiver, William H. Craig, Jr., and counsel for defendant are directed that payments for maintenance, care, and operation of the property of the corporation are to be paid by the receiver, upon presentation to him of payroll accounts and outstanding bills, if it appears to the receiver that such expenditures have been incurred in the operation of the project and receipts are furnished for all prior payments of similar charges.'
>
> "It appears that Garden Homes, Inc. was justly indebted to J. J. Moreau & Son, Inc. in the amount of $369.33 for goods used in the maintenance of the project, and to one Joseph Pepin in the sum of $44.64 and one Sal Toscano in the amount of $59.12 for maintenance services. Upon receipt of a proper

voucher, signed and certified by Angus M. MacNeil, the receiver, in accordance with the order of September 17, 1953, gave Garden Homes, Inc. sufficient funds with which to satisfy the above debts. The attention of the court was directed to the failure of Garden Homes, Inc. to disburse these funds to the creditors at a hearing held June 27, 1955, upon, inter alia, the receiver's final report. MacNeil was present at this hearing and the court directed as follows: 'I am going to give you twenty days to produce that money or issue a citation for you to show cause why you shouldn't be cited for contempt' and Garden Homes, Inc. was informed of this directive. On November 15, 1955, in open court, the court inquired of MacNeil whether its directive had been complied with, and, advised that it had not, gave him notice, pursuant to Rule 42(b) of Federal Rules of Criminal Procedure, that a hearing would be held to determine whether he was guilty of civil and criminal contempt. The court stated the essential facts constituting the offense charged."

It further appears from the record that bad checks drawn in favor of Pepin and Toscano in the amounts of $44.60 and $59.12 respectively and signed Somerville Milling Company by Angus M. MacNeil were cashed for the drawees by Champagne's Super Market which at the time of the trial had not attempted to obtain restitution from the drawees and had been unable to collect from the drawer.

The record further shows that the defendant attempted to elicit testimony to the effect that Garden Homes, Inc. delivered merchandise to J. J. Moreau and Sons, Inc. in excess of $369, it apparently being contended that the bill in that amount had thereupon been paid.

Still further we think it should be noted that this entire

proceeding in its civil as well as criminal aspect was initiated by the trial judge entirely on his own motion without application by any party to the original foreclosure action.

Defendant contends that there was no valid order which was legally entered upon which a contempt could be predicated. We do not agree. The order of September 13, 1953, although ostensibly directed toward the receiver, clearly contemplated that all funds paid over would be applied by the defendant to the payment of bills approved by the receiver.

Defendant further contends that there was no notification and information of the crime charged as required by law. We find no merit in this contention. The defendant was apprised by the trial judge in open court as follows:

> "I will correct that, I am going to give you plenty of time for doing those things. I am going to have the United States Attorney proceed under the process for civil and criminal contempt, under Rule 42. Under that rule, I will give you notice—December 12th, at 11:00 a.m. You will have reasonable time for the preparation of the defense which you say you have, and the essential facts that are to be considered is the order of June 27th—I think that is the date of the order, isn't it? June 27th, 1955. And your failure to comply with the order of the Court, which was—under date of September 17, 1953. I will read it to you so that you will have full concept of what it was: 'Upon consideration of the defendant's motion for instructions (that means, of course, Garden Homes) filed August 10, 1953, the receiver, William H. Craig, Jr. and counsel for the defendant, are directed that payments for maintenance, care and operation of the property of the corporation are to be paid by the receiver upon presentation to him of payroll accounts

and outstanding bills, if it appears to the receiver that such expenditures have been incurred in the operation of the project, and receipts are furnished for all prior payments of similar charges.' That is the order that went out under my signature. Now, those are the essential facts upon which you will be proceeded against, Mr. MacNeil. Let me add parenthetically that I have no desire to hold you in contempt—not any. I do feel, however, that you should comply with the agreement which you made with this court and which you operated under for so many months without any question. There is the picture. I want to give you opportunity to prepare yourself and to take up this matter. I would rather not have this unpleasantness arise. If you can establish that you are not liable for those items, all well and good."

This was a clear compliance with Rule 42(b), F.R.Cr.P. which provides in part:

> "A criminal contempt except as provided in subdivision (a) of this rule shall be prosecuted on notice. The notice shall state the time and place of hearing, allowing a reasonable time for the preparation of the defense, and shall state the essential facts constituting the criminal contempt charged and describe it as such. The notice shall be given orally by the judge in open court in the presence of the defendant or, on application of the United States attorney or of an attorney appointed by the court for that purpose, by an order to show cause or an order of arrest.* * *"

Defendant's contention that hearings were held in his absence is disproved by the record and merits no serious consideration.

Likewise without merit is the contention that defendant

was subjected to double jeopardy in violation of law by the court's action in vacating the verdicts of December 30, 1955, wherein defendant was found guilty of civil and criminal contempt, and the substitution therefor on January 4, 1956, of a sentence to the following effect:

> "* * * I am now making a guilty finding in criminal contempt and I am finding you in civil contempt, which is reflected by my findings this day which have been reduced to an opinion, and which I will hand you a copy."

This amounts to nothing more serious than changing the date of the findings. No substantial changes were introduced and the defendant has not been prejudiced. Although the opinion of January 4, 1956, which was incorporated by reference into the judgment of the same date emphasized that the defendant was not personally liable for the payments ordered, this was apparently done out of an abundance of caution since the verdict of December 30 did not in any way imply a personal obligation. *Parker* v. *United States*, 126 F.2d 370 (1 Cir. 1942).

We defer momentarily our consideration of defendant's contention that there was no loss complained of by the plaintiff, preferring to treat it in conjunction with the additional contention that the court took a very interested position and was the real prosecutor.

Accordingly we turn now to the contention that the defendant was given no opportunity to plead to the charges or to obtain copies of charges. It has already been established that defendant was apprised of all charges against him and that no written notice was required under Rule 42(b)." * * * The proceeding is summary in character, and technical pleadings are not required, but it is sufficient that by petition, affidavit, or other showing it is made

to appear that there has been a willful violation of the court's order. To this pleading, whatever it may be, it would be proper for defendants to file a formal answer, if they so desire." *Hammond Lumber Co.* v. *Sailors' Union of the Pacific*, 149 Fed. 577, 580 (C.C.N.D.Cal.1906). The record in the instant case does not reveal that the defendant attempted to make a formal answer or that he was deprived of an opportunity to do so.

There is no merit in the further contention that the finding and sentence were for matters not charged.

We turn finally to a consideration of the related contentions that there was no loss complained of by the plaintiff and that the court took a very interested position and was the real prosecutor. With respect to the criminal aspect of this case these contentions are clearly without merit. "It becomes the duty of the judge to take affirmative action when the lawful commands of the court are defied and it was not the purpose of Rule 42(b) to limit the authority of the judge or to make the institution of a contempt proceeding contingent upon the consent of any attorney, but rather to aid the judge by providing for the prosecution of the charge by an attorney rather than by the court." *In Re Fletcher*, 216 F.2d 915, 917 (4 Cir. 1954).

In *Fletcher* v. *United States*, 174 F.2d 373, 376 (4 Cir. 1949) the court said:

> "* * * It is expressly provided by statute that the court shall have power to punish by fine or imprisonment the contempt involved in disobedience of its orders, 18 U.S.C.A. § 401(3); and there is nothing in the statute which limits the power of the court to cases commenced by the complaint or affidavit of another person. * * *"

It becomes important in this connection to note the fundamental distinction between criminal and civil contempt. *In Re Nevitt*, 117 Fed. 448, 458 (8 C.C.A. 1902) contains the following language:

> "Proceedings for contempts are of two classes,—those prosecuted to preserve the power and vindicate the dignity of the courts, and to punish for disobedience of their orders, and those instituted to preserve and enforce the rights of private parties to suits, and to compel obedience to orders and decrees made to enforce the rights and administer the remedies to which the court has found them to be entitled. The former are criminal and punitive in their nature, and the government, the courts, and the people are interested in their prosecution. The latter are civil, remedial, and coercive in their nature, and the parties chiefly in interest in their conduct and prosecution are the individuals whose private rights and remedies they were instituted to protect or enforce.* * *"

In *Kreplik* v. *Couch Patents Co.*, 190 Fed. 565, 569 (1 C.C.A. 1911) the court said:

> "The courts of the United States recognize that the process of contempt has two distinct aspects—one criminal, to punish disobedience; and the other remedial and civil to enforce a decree of the court, and to compensate private persons.* * * The court clearly draws the vital distinction between proceedings for civil contempt, which are between the original parties, and proceedings at law for criminal contempt, which are between the public and the defendant.* * *"

Although there does not appear to be much express uthority on the point, we believe that logic, and to some xtent precedent as well, supports the proposition that ivil contempt proceedings may be instituted only by the arties primarily in interest.

In Re Paleais, 296 Fed. 403, 407 (2 C.C.A. 1924), conains the following language:

> "The general rule is that a proceeding for contempt to enforce a civil remedy can be instituted by an aggrieved party, or by one who succeeds to his rights, or by one who has a pecuniary interest in the right to be protected.* * *"

In *Secor* v. *Singleton*, 35 Fed. 376, 378 (C.C.E.D. Mo. 888), the court said:

> "* * * When an injunction has been granted, as in this instance, in a suit between individuals to protect one of the parties in the enjoyment of some private right, immunity, or franchise, it seems to be the rule that no one can complain of a violation of the same, unless it be some one who has a present interest in maintaining the injunction, nor unless he was a party to the suit in which the order was obtained, or for some reason stands in privity with one who was a party to the litigation. In cases where an injunction has been granted to enforce or maintain a merely private right, a proceeding instituted to punish a party for violating the order is very generally regarded as a proceeding to redress a private injury in which the public have no concern, and for that reason the prosecutor or person filing the information must have an interest in the proceeding differing from that of the

general public; otherwise the courts will not entertain the information.* * *"

The following statement appears in an article entitled *Civil and Criminal Contempt in Federal Courts*, 17 F.R.D. 167, 172:

> "An action for civil contempt can only be commenced by an aggrieved party or by someone who has an interest in the right to be protected. *Federal Trade Commission* v. *A. McLean & Son*, 7 Cir., 1938, 94 F.2d 802; *Bowles* v. *Camillaci*, D.C.W.D.N.Y. 1943, 53 F. Supp. 976. A proceeding for criminal contempt, on the other hand, can be commenced by the government, on its own initiative or on the relation of an individual who need not have an interest in the enforcement of the order violated, or by the court on its own motion, Fed. R. Crim. P. 42(b)."

It would appear from these authorities, and indeed from the very nature of the judicial function, that the trial court can have only a public as distinguished from a private interest in the enforcement of its own decrees. It seems to us, therefore, that regardless of what label may be appended to the proceedings by the court, any action of contempt initiated by the court of its own motion must be regarded as criminal in nature for the vindication of the court's authority and the punishment of the public wrong. "A civil contempt proceeding is wholly remedial, to serve only the purposes of the complainant, not to deter offenses against the public or to vindicate the authority of the court." *United States* v. *International Union, Etc.*, 190 F.2d 865, 873 (D.C. Cir. 1951).

We find support for this position in the language of Title 18 U.S.C. § 401:

> "A court of the United States shall have power to punish by fine or imprisonment, at its discretion, such contempt of its authority, and none other, as—
>
> "(1) Misbehavior of any person in its presence or so near thereto as to obstruct the administration of justice;
>
> "(2) Misbehavior of any of its officers in their official transactions;
>
> "(3) Disobedience or resistance to its lawful writ, process, order, rule, decree, or command."

It is clear that in a criminal contempt proceeding both a fine and imprisonment may not be imposed for a single act of contempt. *Carter* v. *United States*, 135 F.2d 858 (5 Cir. 1943). It is equally clear that both may be imposed where the same act constitutes civil and criminal contempt. So long as civil contempts are restricted to those initiated by the parties primarily in interest we see nothing objectionable in the double sentence—one remedial, the other punitive. We believe, however, that such a double sentence is not proper where the parties primarily in interest have not complained and where the trial judge, in effect, seeks to turn the remedial sentence for civil contempt into additional punishment for an offense to the public interest. If the court may accomplish this by merely adding the word "civil" to his charge of criminal contempt then the provisions of § 401 become meaningless.

Perhaps it should be noted that the language in *United States* v. *Mine Workers*, 330 U.S. 258, 301, 302 (1947) lends inferential support to our position:

"Apart from their contentions concerning the formal aspects of the proceedings below, defendants insist upon the inability of the United States to secure relief by way of civil contempt in this case, and would limit the right to proceed by civil contempt to situations in which the United States is enforcing a statute expressly allowing resort to the courts for enforcement of statutory orders. *McCrone* v. *United States*, 307 U.S. 61 (1939), however, rests upon no such narrow ground, for the Court there said that 'Article 3, § 2, of the Constitution, expressly contemplates the United States as a party to civil proceedings by extending the jurisdiction of the federal judiciary "to Controversies to which the United States shall be a Party." ' Id. at 63. The United States was fully entitled to bring the present suit and to benefit from orders entered in its behalf. We will not reduce the practical value of the relief granted by limiting the United States, when the orders have been disobeyed, to a proceeding in criminal contempt, and by denying to the Government the civil remedies enjoyed by other litigants, including the opportunity to demonstrate that disobedience has occasioned loss."

We think this language implies that if the United States were denied the civil remedies enjoyed by other litigants there could be no civil aspect to that case—in other words the language seems to exclude any possibility that the court could initiate civil proceedings on its own motion.

The judgment of the district court finding that MacNeil is in violation of Title 18 U.S.C. § 401 (2) and (3) is affirmed and that part of the judgment finding MacNeil to be in civil contempt is reversed.

Appendix B

Portion of Rule 24 of the Court of Appeals for the First Circuit.

1.) Record Appendices to Briefs. . . . The Appellee or respondent shall print as an appendix to his brief (which appendix may be bound separately) such parts of the record as he deems it essential for the judges of the Court to read to decide the questions presented and as have not been printed in the appendix to the brief of appellant or petitioner. Those portions of the record printed in an appendix shall be arranged therein in chronological order . . . reference to the pages of the typewritten transcript of the testimony shall be made where the printed testimony appears and the names of the witnesses shall be included."

8.) Filing within thirty days after the record on appeal or review is filed with the clerk of this court the appellant or petitioner shall file twenty-five copies of his printed brief and appendix thereto with proof of service. . . . The appellant or petitioner may in like manner serve and file a reply brief. . . . No other briefs may be filed without special leave of Court.

Record on Appeal from the District Courts

1.) Original papers to constitute record on appeal. Appeals from the district courts in all cases, civil, criminal including admiralty cases, shall be heard on the original papers, which papers shall constitute the record on appeal (citations).

2.) Transmission of Record on Appeal. Promptly after notice of appeal is filed in the district court and within the time prescribed by the rules referred to in Rule 21, unless the district court by order has fixed a shorter time, the

clerk of the District Court shall transmit to the clerk of this court all original papers in the file dealing with the action or proceedings in which the appeal is taken, with the exceptions of such omissions as are agreed upon by written stipulation of the parties on file, and shall append his certificate identifying the papers with reasonable definiteness. If a transcript of the evidence is on file the clerk shall transmit that also; otherwise the appellant shall file with the clerk for transmission such transcript of the testimony as he deems necessary for his appeal subject to the right of an appellee either to file additional portions or procure an order from the district court requiring the appellant to do so. With the original papers the clerk of the district court shall transmit a copy certified by him of the relevant docket entries in the district court.

Appendix C

Edwards v. *U. S.*, 312 U.S. 473, 482.

The parties must be given an opportunity to plead and prove their contentions otherwise the impression of the judge arising from sources outside the record dominates results. The requirement that allegations must be supported by evidence tested by cross examination protects against falsehood. The opportunity to assert rights through pleadings and testimony are essential to their successful protection. Infringement of that opportunity is forbidden. Cf. *Walker* v. *Johnston*, 312 U.S. 275.

Excerpt from *Crowe* v. *U. S.*, 200 F.2nd 526

A leading principle that pervades the entire law of criminal procedure is that after indictment is found, nothing shall be done in the absence of the prisoner, *Lewis* v. *U. S.*, 146 U.S. 370, 372. The Supreme Court there stated, "And it appears to be well settled that where the personal presence is necessary in point of law, the record must show the fact" *Wilson* v. *Bell*, 137 F.2nd 716.

Bowman Dairy Co. v. *U. S.*, 341 U.S. 214, 221.

Concerning a subpoena

One should not be held in contempt under a subpoena that is part good and part bad. The burden is on the court to see that the subpoena is good in its entirety and it is not upon the person who faces punishment to cull the good from the bad.

Crain v. *U. S.*, 162 U.S. 625, 644.

It is true that the constitution does not in terms declare that a person accused of crime cannot be tried until it be demanded of him that he plead to the indictment. But it does forbid the deprivation of liberty without due process of law, requires that the accused plead or be ordered to plead or in proper cases that plea of not guilty be filed for him before trial can rightfully proceed and record of her conviction should show distinctly and not by inference merely that every step involved in due process of law and essential to valid trial was taken by the court otherwise the judgment would be erroneous.

Crain v. *U. S.*, 162 U.S. 625.

Until the defendant has pleaded to the indictment there is no issue to be submitted to the jury and the omission to plead is fatal to the judgment even after verdict. This applies to cases of misdemeanors as to cases of felony. . . . The authorities are to the effect that while arraignment may be waived the plea is absolutely essential. . . . But a trial without the entry of any plea by or on behalf of the defendant is invalid.

In re Oliver, 333 U.S. 257.

As a minimum due process requires that an accused be given reasonable notice of charges against him, the right to examine witnesses against him, the right to testify in his own behalf and the right to be represented by counsel.

Chambers v. *Florida*, 309 U.S. 227

It is "the law of the land" that no man's life, liberty or

property be forfeited as punishment until there have been a charge fairly made and fairly tried in a public trial.

White v. *Regan*, 324 U.S. 760, 764.

The requirement of course contemplates that the accused be so informed sufficiently in advance of trial of charge to enable him to determine the nature of plea to be entered and to prepare his defense if one is to be made.

Wilson v. *State of North Carolina*, 169 U.S. 586, 600.

"No one can be punished for a criminal contempt unless the evidence makes it clear that he intended to commit it. To doubt is to be resolved in favor of respondent."

"Past cases have decided that a defendant put to trial before a jury may be subjected to the kind of jeopardy that bases a second trial for the same offense even though first trial is discontinued without a verdict. See *Kemper* v. *U. S.*, 195 U.S. 100, 128. Cf. *Palko* v. *Connecticut*, 302 U.S. 319, 322, 323.

Van Moltke v. *Gillies*, 332 U.S. 708, 722.

It is the solemn duty of a Federal judge before whom a defendant appears without counsel to make a thorough inquiry and to take all steps necessary to insure the fullest protection of his constitutional rights at every step of the proceedings. *Johnston* v. *Zerbst*, 304 U.S. 458, 463; *Hawk* v. *Olson*, 326 U.S. 271, 278.

The same may be true where a judge trying a case without a jury fails for some reason to enter a judgment. *McCarthy* v. *Zerbst*, 85 F.2nd 640, 642.

Where a case is tried to a court without a jury, jeopardy begins after accused has been indicted and arraigned, has

pleaded and the court has begun to hear evidence. *McCarthy* v. *Zerbst*, 85 F.2nd 640, 642.

Shelp v. *U. S.*, 81 F. 694.

Until the accused pleads to the indictment and thereby indicates the issue submitted by him for trial there is nothing for the jury to try and the fact that the defendant did so plead should not left to be inferred from a general recital in some order that the jury was sworn to try the issues joined.

In the matter of intent that too is an essential element of criminal contempt and must be established beyond a reasonable doubt.

U. S. v. *Kroger Grocery and Baking Co.*, 7 cir. 163 F.2nd 168.

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404259—56

In the Supreme Court of the United States

OCTOBER TERM, 1956

No. 425

ANGUS M. MACNEIL, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Appeals (Pet. App. A. 19–30; R. 215–226) has not yet been reported. The opinion of the District Court appears at pages 10–13 of the record.

JURISDICTION

The judgment of the Court of Appeals was entered on August 10, 1956 (R. 227). A petition for rehearing was denied on August 15, 1956 (R. 227). On September 10, 1956, Mr. Justice Frankfurter extended the time for filing a petition for a writ of certiorari to September 28, 1956. The petition was filed September 14, 1956. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTION PRESENTED

At the request of petitioner, as president of a corporation the property of which was in receivership but which was managing the property, the District Court issued an order directing the receiver to turn over to the corporation sufficient funds to pay bills submitted by the corporation for operating expenses. When the corporation, after receiving the money, failed to make such payments, the court orally ordered petitioner, on behalf of the corporation, to do so, but petitioner failed to comply. The questions presented are:

1. Whether petitioner was properly held in contempt of court for willful failure to obey the orders of the court.

2. Whether the fact that the court also characterized the act of non-compliance as misbehavior of an officer of the court requires reversal of the conviction.

3. Whether petitioner was accorded due process, and his proper procedural rights, in the contempt proceedings.

STATUTE AND RULE INVOLVED

18 U. S. C. 401 provides in pertinent part:

> A court of the United States shall have power to punish by fine or imprisonment, at its discretion, such contempt of its authority, and none other, as—
>
> * * * * *
>
> (2) Misbehavior of any of its officers in their official transactions;
>
> (3) Disobedience or resistance to its lawful writ, process, order, rule, decree or command.

Rule 42 (b), F. R. Crim P. provides:

> *Disposition Upon Notice and Hearing.*—A criminal contempt except as provided in subdivision (a) of this rule shall be prosecuted on notice. The notice shall state the time and place of hearing, allowing a reasonable time for the preparation of the defense, and shall state the essential facts constituting the criminal contempt charged and describe it as such. The notice shall be given orally by the judge in open court in the presence of the defendant or, on application of the United States attorney or of an attorney appointed by the court for that purpose, by an order to show cause or an order of arrest. The defendant is entitled to a trial by jury in any case in which an act of Congress so provides. He is entitled to admission to bail as provided in these rules. If the contempt charged involves disrespect to or criticism of a judge, that judge is disqualified from presiding at the trial or hearing except with the defendant's consent. Upon a verdict or finding of guilt the court shall enter an order fixing the punishment.

STATEMENT

Petitioner seeks review of the judgment of the Court of Appeals for the First Circuit which affirmed that part of the judgment of the District Court for the District of New Hampshire (R. 10–13) finding petitioner guilty of criminal contempt in violation of 18 U. S. C. 401 (2) (3) (Pet. App. A. 19–30; R. 215–226). The basis of the contempt conviction was petitioner's failure to comply with orders of the

District Court issued on September 17, 1953, and June 27, 1955 (R. 213).

An action had been commenced by the government in the District Court to foreclose a mortgage upon a multiunit housing project owned by Garden Homes Inc., of which petitioner was president (R. 93, 199). A receiver for rents and profits was appointed, with authority to reimburse Garden Homes, which retained possession of the premises pending final adjudication, for necessary expenses incurred in maintenance and operation of the project (R. 10). Petitioner, on behalf of Garden Homes, complained that the procedure whereby the corporation received reimbursement from the receiver only after it had actually paid bills created an undue financial burden on the corporation, and that, in lieu thereof, the court should direct the receiver to reimburse Garden Homes upon its submission of periodic vouchers setting forth the debts incurred (R. 76–87). The court granted this motion and issued an order on September 17, 1953, as follows (R. 62):

> * * * Upon consideration of the defendant's motion for instructions filed August 10, 1953, the receiver, William H. Craig, Jr., and counsel for the defendant are directed that payments for maintenance, care and operation of the property of the corporation are to be paid by the receiver upon presentation of him of payroll accounts and outstanding bills, if it appears to the receiver that such expenditures have been incurred in the operation of the project and receipts are furnished for all prior payments of administration charges. A. J.

Connor, United States District Judge. A true copy certified this 12th day of December 1955, Elizabeth M. Hoyt, Chief Deputy Clerk, Seal.

On June 27, 1955, the receiver, in the course of his final report, notified the court that Garden Homes had failed to pay a debt in the sum of $369.33 to J. J. Moreau & Sons, and had issued bad checks, which bore petitioner's signature (R. 166), for salaries owing to two employees, in the sums of $44.64 and $57.56 (R. 97, 112). The receiver reported that vouchers evidencing these obligations had been honored by him, and funds turned over to Garden Homes in May 1954 (R. 122). The court ordered petitioner, who was present at the June 27 hearing, to produce the money within 20 days or show cause why he should not be punished for contempt (R. 93).

On November 25, 1955, petitioner advised the court that he had not complied with the order of June 27, 1955 (R. 111). He stated that he did not recognize "any order having been made" (R. 111) and alleged further that he had no personal obligation to comply (R. 114–117). The court made it clear that petitioner's obligation was not personal, but in his capacity as an officer of the corporation (R. 93, 116, 209).

The court then gave petitioner oral notice that a proceeding would be had on December 12, 1955, to determine whether petitioner was guilty of civil and criminal contempt. The court stated that it was giving petitioner ample time to prepare his defense; that the issues would be whether petitioner had failed to comply with the orders of September 17, 1953, and June 27, 1955 (R. 115–116). The court also said that the

United States Attorney would prepare written charges, but that he was stating the substance of the charges (R. 116–117).

At the subsequent contempt hearing, the receiver testified that he had received a letter dated May 10, 1954, signed by petitioner on behalf of Garden Homes, enclosing a voucher for over $1,600, which included the debts in issue; that, after ascertaining that Garden Homes had collected $1,200 for rents, he had forwarded $440.28 to Garden Homes to cover the balance of the voucher, and that the check had been returned to him cancelled (R. 121–123). The receiver's check for $440 was dated May 12, 1954, two days before the foreclosure sale of the premises, which had been widely advertised for May 14 (R. 160). The employees testified that the work for which the checks signed by petitioner were received was performed for Garden Homes (R. 179, 183). The checks had been returned to a supermarket, where they had been cashed, as drawn on insufficient funds (R. 163–164). The bill of Moreu & Sons for merchandise delivered to employes of Garden Homes was not paid (R. 124–136).

Petitioner, although not availing himself of the opportunity to present evidence in his own defense (R. 198), sought, by cross-examination of the government's witnesses and in summation, to exculpate himself by suggesting that the employees were not directly employed by Garden Homes and had, in any event, been paid since the supermarket had not pressed them for reimbursement (R. 206); that the amounts the receiver still owed Garden Homes (apparently for

telephone bills which the receiver had found unsubstantiated (R. 132–133)) exceeded the amount of the claims involved in the contempt proceeding (R. 200–201); and that Garden Homes was not indebted to Moreau, although he refused to clarify his position on that item (R. 159).

On December 30, 1955, petitioner was found guilty of civil and criminal contempt (R. 211). On January 4, 1956, the court "vacated" the verdicts of December 30, 1955, and substituted a similar verdict in accordance with its written opinion handed to petitioner (R. 212). At this point, petitioner requested that he be assigned counsel, a request which was denied (R. 212–213). Petitioner was then adjudged in civil contempt and ordered to return $473.09 to the receiver. He was further found guilty of criminal contempt and ordered to pay a fine of $400.00, together with costs in the amount of $137.59, to the clerk of the court (R. 213).

The Court of Appeals unanimously affirmed the conviction for criminal contempt but reversed that for civil contempt on the ground that civil proceedings could not be initiated by the court itself (Pet. App. A., 28–30).

ARGUMENT

1. Petitioner argues (Pet. 17) that he could not be guilty of contempt because the order of September 17, 1953, was by its terms directed solely to the receiver. The order, however, which was obtained at petitioner's request, manifestly contemplated that Garden Homes would pay out the moneys for which it was

allowed to submit vouchers to, and receive funds from, the receiver. By its terms, the order conditioned the receiver's duty to remit funds to Garden Homes on the furnishing of receipts for payments by the corporation to its creditors out of the funds previously handed over by the receiver (see the Statement, *supra,* pp. 4–5). The duty to make the payments did not evaporate because the foreclosure sale terminated the need for further vouchers. In any event, the court's further order of June 27, 1955, made it clear to petitioner that he, as president of Garden Homes, was obligated to make the payments for which money had been turned over. Petitioner admittedly failed to obey that order.

There is no substance to petitioner's allegation that wilfulness was not established (Pet. 15). The evidence shows that the petitioner knew of the directive and deliberately failed to comply with it. Cf. *In re Rice,* 181 Fed. 217, 224 (M. D. Ala.). *Wilson* v. *North Carolina,* 169 U. S. 586, cited by petitioner, is not apposite since it was not shown there that the alleged contemnor had knowledge of the court's directive.

Throughout the proceedings, the District Court made it clear that the orders were directed to petitioner in his capacity as representative of Garden Homes. As such, he could properly be held liable for willful disobedience since "[a] command to the corporation is in effect a command to those who are officially responsible for the conduct of its affairs". *Wilson* v. *United States,* 221 U. S. 361, 376. See, in accord, *National Labor Relations Bd.* v. *Hopwood Retinning Co.,* 104

F. 2d 302, 305 (C. A. 2); *Parker* v. *United States,* 126 F. 2d 370, 374 (C. A. 1).

2. In finding petitioner guilty of criminal contempt because of his willful disobedience of its orders, the court specified the contempt as under 18 U. S. C. 401 (3) and (2) (*supra,* p. 2). Petitioner argues (Pet. 9) that, since this Court ruled in *Cammer* v. *United States,* 350 U. S. 399, that a lawyer is not an officer of the court under Section 401(2), his conviction cannot stand. There was here, however, only one charge—disobedience of the orders of the court—which was amply proved. The fine imposed was approximately the amount of the money withheld. There was clearly only one penalty for the one offense; there was no separate specification under Section 401(2), and no sentence based thereon. Since the contempt conviction is fully supported by Section 401(3), the situation is no different than if the court had cited two cases in support of its judgment, one of which was found not to apply.

3. Petitioner makes a number of assertions designed to show that he was denied due process, or his procedural rights, in the contempt proceeding. All are without merit.

a. Petitioner was given ample notice and opportunity to defend. On June 27, 1955, he was told to pay the bills or show cause why he should not be punished for contempt. On November 25, 1955, he was, in open court, given formal notice that a contempt hearing would commence on December 12, 1955, and was given formal oral notice of the nature of the

charge (see the Statement, *supra*, p. 5).[1] This was itself sufficient compliance with Rule 42(b), *supra*, p. 3. In addition, written charges were prepared by the United States Attorney. Rule 42(b) does not contemplate formal arraignment procedure; it is sufficient that a defendant have notice of the charges and opportunity to prepare his defense. *United States* v. *Lederer*, 140 F. 2d 136 (C. A. 7), certiorari denied, 322 U. S. 734; *Hammond Lumber Co.* v. *Sailors' Union of the Pacific*, 149 Fed. 577, 580 (N. D. Cal.); *Phillipe* v. *Window Glass Cutters League of America*, 99 F. Supp. 369 (W. D. Ark.).

b. Petitioner's assertion that his request for assignment of counsel was improperly denied (Pet. 13) is refuted by the record. Petitioner, an attorney, represented himself and never requested counsel until after conviction, immediately prior to imposition of sentence on January 4 (the trial had concluded on December 30) (R. 212–213). At this point, the court properly denied the request. Moreover, petitioner never alleged inability to obtain counsel for himself.[2]

[1] Petitioner argues that this court cannot consider the oral notice given by the district judge since that notice is contained in the portion of the government's record appendix which he apparently claims was in some way inaccurate and never properly certified (Pet. 10–11). This argument has more ingenuity than merit. If petitioner really believed that the government's appendix contained inaccuracies or misstatements, he should have sought relief by application to the District Court as provided by Rule 75 (h) of the Federal Rules of Civil Procedure.

[2] The oral direction to petitioner on June 27, 1955, to pay the bills was made in the course of the receiver's report in the fore-

c. There is no foundation for petitioner's contention (Pet. 9) that he was in double jeopardy because the court, after orally finding him guilty of civil and criminal contempt on December 30, 1955, stated on January 4 that it was vacating the prior judgment and making findings in accordance with its written opinion. The January 4 pronouncement was merely a rephrasing of the December 30th finding. As noted by the court below, its chief effect was to change the date of the findings (Pet. App. A. 24; R. 220).

d. The record refutes petitioner's claim (Pet. 14) that hearings were held on December 12, 1955, in his absence; the hearings scheduled for that date were delayed because of petitioner's late arrival (R. 43–46).

In short, petitioner was given every opportunity to explain his willful disobedience of the orders of the court. His failure to do so does not show a lack of due process.

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closure action, at a hearing at which petitioner was present but not as an attorney. Thereafter, the following colloquy occurred (R. 94):

"Mr. MacNeil. Your Honor, may I participate in these hearings?

"The Court. You may not until you have complied with the rule that I have laid down. You associate yourself with local counsel and you will be allowed to participate."

The court refused to note an exception since petitioner was not there in a legal capacity (R. 94).

Petitioner's right, as an individual, to participate in the receivership proceedings manifestly has no relation to the contempt hearing where petitioner was given every right to present his defense. To the extent that petitioner seems to be arguing (Pet. 16) that this shows he was not a party to the order, it is merely a reiteration of the position discussed in the text, *supra*, pp. 7–9, that he was not bound by the order.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

J. LEE RANKIN,
Solicitor General.
WARREN OLNEY III,
Assistant Attorney General.
BEATRICE ROSENBERG,
JEROME M. FEIT,
Attorneys.

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